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OCT 4 1988

No. 88-389

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

MOTION TO PROCEED IN FORMA PAUPERIS

The appellee, June M. Betts, asks leave to file the attached Motion to Affirm, without prepayment of costs and to proceed in forma pauperis.

Appellee has not sought to proceed in forma pauperis in the courts below. In 1985, appellee paid $100.00 to cover filing fee and expenses and has made no further payments.

Appellee is divorced, has Altzheimer's disease and has been in a full-care nursing home since April 1987 with expenses of $2,127.00 per month and income of only $863.26. The Affidavit of Andrew R. Betts, attorney-in-fact for appellee, in support of this motion is attached hereto.

ROBERT F. LAUFMAN
(Counsel of Record)
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No. 88-389

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

AFFIDAVIT OF ANDREW R. BETTS

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

I, Andrew R. Betts, being first duly sworn according to law, depose and say:

1. I am the son, next of kin and duly appointed attorney-in-fact pursuant to a Power of Attorney dated April 14, 1987, attached hereto as Exhibit A, of June M. Betts, appellee in the above-entitled case.

2. I state that I am in a position to know the nature and extent of all of appellee's property, obligations and expenses and based upon my knowledge of appellee's business and financial affairs, because of her poverty, appellee is not able to pay the costs of said case or to give security; and that as her attorney-in-fact and next of kin, I believe appellee to be entitled to redress.

3. Appellee has been diagnosed as having an incurable Altzheimer's related disorder that prevents her from comprehending the nature of her financial and business affairs. At present she is bedridden and confined to a full-care nursing home.

4. Since my appointment I have attended to all of appellee's business and financial affairs and believe the following are all of the facts pertinent to the question of her ability to pay the costs and expenses of the proceedings and to give security.

5. Appellee has not been employed since June 1985. At the time her employment was terminated she was earning less than $1,000 per month.

6. Within the past twelve months, appellee has not received any income from a business, profession, or other form of self-employment, or in the form of rent payments.

7. At present, Appellee's monthly expenses exceed her monthly income by $1,963.74 each month. Income and expenses are as follows:

Source	Monthly Income	
PERS Disability Retirement	$163.26	
Alimony (To be reduced upon retirement of former husband)	$700.00	
Total Income		$863.26

Expense	Monthly Expense	
Arbors of Milford (Nursing Home)	$2077.00	
Misc. Expenses	$ 50.00	
Total Expense		$2127.00

8. Appellee owns no real estate, automobile, or other valuable property.

9. Appellee has the following assets:

$3,742.00	Ameritrust IRA (face value, subject to early withdrawal penalty and taxes.
$2,860.00	Merrill Lynch IRA (face value, subject to early withdrawal penalty and taxes.
$ 984.39	Phoenix Mutual Life Insurance Policy (cash value as of September 30, 1988)
$2,254.70	Star Bank Checking Account (9-15-88)
$13,338.60	1,034 shares in the Puritan Fund. Dividends are automatically reinvested. Value as of 9-15-88.

10. Based on current expenses and current income, I estimate that the Puritan Fund and the Star Bank checking account will be exhausted within 12 months and the remaining assets will be exhausted in another 5 months. At that point she will be destitute.

11. I have recently learned that Appellee may be eligible for social security benefits equal to 35% her former husband's social security benefits. I have applied for these benefits but have been unable to learn the amount. The benefits are not expected to be high as her former husband is a minister with little taxable income. I have also located and will apply for an annuity with TIAA which will pay $94.00 per month.

12. Appellee is unmarried and has no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Andrew R. Betts

Sworn to and subscribed in my presence this ____ day of September, 1988.

Notary Public

1

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

THAT I, JUNE M. BETTS, 952 Lenox Place, Cincinnati Ohio 45229, County of Hamilton, State of Ohio, have made, constituted and appointed, and by these presents do make, constitute my son, ANDREW R. BETTS for me and in my name, place and stead,

To take custody of and receive, deposit, withdraw and/or disburse any and all financial accounts and funds which I own or may receive, to determine and pay my current obligations and to handle my finances for my best interest. To sign checks and enter contracts on my behalf and enforce same.

To take custody of and assume full control over all of my personal property including any and all stocks, bonds and other certificates of investment in my name as I might do myself.

In the event that I am unable to take part in decisions for my own future, I further authorize my said attorney in fact to make any necessary determination on my behalf as to necessary or desirable medical treatment or the lack thereof, and to grant such consents therefor as may be appropriate.

In the event that a Court of competent jurisdiction determines that a guardian of my person or property is necessary or desirable, I hereby nominate and request the Court to appoint my said attorney, ANDREW R. BETTS, to serve without bond.

I hereby give and grant unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute shall lawfully do or cause to be done by virtue hereof. This Power of Attorney shall not be affected by disability of the principal, in accordance with O.R.C. 1337.09.

A photostatic copy of this document, delivered by me or by my said attorney to any third party will be conclusive to such third party that this Power of Attorney has not been terminated and will continue in effect until such third party is advised by written notice from me or my said attorney of such termination. The attorney shall keep a record of all such third parties and shall advise them upon its termination.

IN WITNESS WHEREOF, I have hereunto set my hand this 12 day of April 1987.

Signed and acknowledged in presence of:

June M. Betts
JUNE M. BETTS

STATE OF OHIO COUNTY OF HAMILTON ss:

BE IT REMEMBERED, That on this 12 day of April, 1987, before me, a Notary Public in and for said County, personally appeared the above named JUNE M. BETTS, who acknowledged that she did sign the foregoing instrument and that the same was her voluntary act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, on the day and year last above mentioned.

No. 88-389

In the
SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

On Appeal From
The United States Court of Appeals
For the Sixth Circuit

MOTION TO AFFIRM

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No. 88-389

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

MOTION TO AFFIRM

The appellee, June M. Betts, respectfully moves the Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit because it is manifest that the federal question presented is so unsubstantial as not to need further argument.

STATUTES INVOLVED

The statutes involved are set forth in Appellant's Appendix (A-38) and herein at A-1. The federal regulations involved are set forth in Appellant's Appendix (A-40).

STATEMENT OF THE CASE

In 1985, June Betts ("Betts"), at age 61 was diagnosed as having possible Altzheimer's disease. Her employer, Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB"), informed her that if she did not apply for length of service retirement ("regular retirement") with the Public Employees Retirement System ("PERS"), HCB would initiate forced medical leave and she would receive neither pay nor medical benefits. HCB advised Betts that she was not eligible for disability benefits because she was over 60 years of age. Betts was thus forced into regular retirement. As a regular retiree Betts received only $158.50 per month. Her age made her ineligible for disability benefits which would have paid her $355.02. per month. This difference in benefits to retirees

based on age stems from a post-ADEA amendment to the PERS disability plan (Appendix A-1). The amendment provided that a minimum benefit of 30% of final average salary (FAS) would be paid for disability benefits. No such minimum was set for regular retirement. Betts then applied for regular retirement.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Appellant asks this Court to consider whether age based distinctions in bona fide employee benefit plans, including plans promulgated prior to the passage of the ADEA, must be justified by a substantial business purpose. On that issue, the Sixth Circuit correctly held that discriminatory provisions need a business justification under the ADEA (Section A below).

There are four reasons, however, why the question presented is too unsubstantial to justify further argument before this Court.

1. Contrary to Appellant's claim, only the Sixth, Ninth, and Tenth Circuits are in conflict on the issue of whether a bona fide employees benefit plan promulgated prior to the passage of the ADEA must be justified by a substantial business purpose. Since this case should be decided without reaching this issue, this Court should wait until the issue is presented in a subsequent case following further development in the circuits. (Section B, below)
2. The PERS benefit plan, by denying Betts the option of applying for disability benefits, forced her into involuntary retirement in violation of the ADEA. Even plans that are exempt under § 623(f)(2) may not permit involuntary retirement. (Section C, below).
3. The PERS disability plan is not the type of employee benefit plan exempted by § 623(f)(2). The exemption applies only to those plans in which cost increases with the age of the employee. There is no cost

justification available to PERS in this case. (Section D, below).

4. Even if the § 623(f)(2) exemption applies, the PERS disability plan is defective because there were significant modifications which made the plan discriminatory after passage of the ADEA. The circuits are in complete agreement that significant or relevant changes in a benefit plan after the passage of the ADEA may convert the plan into a subterfuge. (Section E, below).

A. The Sixth Circuit Was Correct In Holding Pre-ADEA Plans Must Show Substantial Business Purpose

It is undisputed that the PERS disability plan discriminates on the basis of age. However, PERS maintains that the plan is exempt from the ADEA under § 623(f)(2). Under this affirmative defense, PERS must meet four criteria: 1) It must be the sort of "plan" covered by the section. 2) It must be "bona fide", which has been held to mean that the plan exists and pays substantial benefits. 3) PERS must have acted in observance of its plan and 4) The plan must not be a subterfuge to evade the purposes of the ADEA. See, E.E.O.C. v Borden's Inc., 724 F.2d 1390, 1395 (9th Cir. 1984).

The PERS disability plan fails to meet three of the above criteria. The plan is not the type covered by § 623(f)(2) (Section D, page 6 below), the plan is not "bona fide" because it permits forced retirement (Section C, page 5 below) and does not pay substantial benefits, and the plan is a subterfuge (Section E, page 9 below).

PERS ignores these criteria and argues that establishment of a discriminatory employee benefit plan prior to passage of the ADEA is a total defense and nothing more need be proved. Their argument focuses only on the definition of "subterfuge" under the Act. In United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977),

this Court held that a retirement plan that predated the ADEA was not a subterfuge of the ADEA even if it permitted involuntary retirement based upon age. Congress amended the ADEA in 1978 to reverse McMann. Applying the amended Act in this case, the Sixth Circuit held that the 1978 amendment to the ADEA clearly required that age-based discrimination within a benefit plan must be justified by a substantial business purpose. In so holding, the Sixth Circuit relied upon the language in the Conference Report on the 1978 Amendments:

> Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments. (emphasis supplied).

H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 529.

The Sixth Circuit was correct in holding that the PERS disability plan is unlawful because it can not be justified by a substantial business purpose.

B. This Is Not The Case To Resolve The Question Raised By Appellant.

This is not the case to resolve the question raised by Appellant as only three circuits have ruled on this issue. Contrary to Appellant's claim, only the Ninth and Tenth Circuits have adopted a position opposite to that of the Sixth Circuit in respect to the proper interpretation of the effect of the 1978 amendment. See, E.E.O.C. v. Orange County, 837 F.2d 420 (9th Cir. 1988) and E.E.O.C. v. Cargill, ___ F.2d ___, 47 F.E.P. Cases 1122 (10th Cir. 1988). Subterfuge was the only issue in Orange County and Cargill. The Sixth Circuit decided this case on other issues as well and its decision should be affirmed.

Furthermore, none of the other circuit court decisions cited at page 8 of Appellant's Jurisdictional Statement discuss the effect of the 1978 Amendment on this Court's decision in McMann. This issue is not sufficiently framed by the circuits below to merit Supreme Court attention.

PERS claims this case is significant because it is the nations's seventeenth largest pension system. While PERS may be large, the impact of this case is minuscule. This case only affects employees who are disabled after they reach age 60 and have less than 15 years of service (employees disabled before age 60 continue to receive disability benefits after age 60, employees who have more than 15 years service generally receive more than 30% FAS). When employees who are disabled after age 60 with less than 15 years service are compared to all other categories, their number pales into insignificance.

Moreover, as set out below, this case has other dispositive issues making Supreme Court attention to the question raised by appellant unnecessary at this time.

C. Depriving Betts of Disability Benefits Resulted In Involuntary Retirement.

Even pre-ADEA bona fide employee benefit plans may not require or permit involuntary retirement. In 1978, Congress amended § 623(f)(2) by adding

> no ... [bona fide] seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 70] because of the age of such individual.

PERS' § 623(f)(2) defense is not available if the plan causes or permits involuntary retirement. Even employee benefit plans which would normally be exempt under § 623(f)(2) are not exempt from the provisions of the ADEA if the plan has the effect of causing involuntary retirement.

Disabled retirees under PERS are on leave of absence from their positions for the first five years and may return to their place of employment.[1] Regular retirees, on the other hand, are ineligible for regular employment in any capacity of public

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1. O.R.C. § 145.39 provides: "A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter."

service.[2] Thus forcing disabled employees to retire also causes them to lose reemployment rights should they become able to work again.

This court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), applied the 1978 amendment and held that by depriving TWA pilots of the option of transferring to flight engineer, an option that was available to younger pilots, the TWA seniority system forced involuntary retirement in violation of § 623(f)(2). Likewise, by depriving Betts the option of disability benefits, an option that was available to younger employees, the PERS disability plan forced involuntary retirement in violation of § 623(f)(2).

As the district court below recognized, plaintiff was presented with a choice of early retirement or nothing (a livelihood or none) and therefore plaintiff was forced into retirement because of age. The Sixth Circuit agreed, describing the effect of the disability plan as "forcing length of service retirement." (Appellant's Appendix A-5).

D. A Long-Term Disability Plan Is Not The Type Of Plan Exempted Under 29 U.S.C. § 623(f)(2) of the ADEA.

Not all employee benefit plans are exempt under § 623(f)(2) of the ADEA. Congress qualified the words "bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan." It suggests that Congress meant to exempt only certain benefit schemes from the ADEA. The legislative history makes it clear that only those benefit plans in which the cost of benefits increased with age were to be exempt.

The cost of certain benefits such as life insurance, retirement plans, and pension plans is greater for newly hired older workers than for other employees. Recognition of this fact

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2. O.R.C. § 145.32 provides: "Any [regular retiree] who accepts an allowance under Chapter 145. of the Revised Code . . . is ineligible for regular re-employment in any capacity which comes within Chapter 145. of the Revised Code."

spurred Senator Javits to propose an amendment that created the "bona fide benefit plan" exemption of § 623(f)(2).

Pursuant to 29 U.S.C. § 628, the Department of Labor, in 1969 and 1979 issued regulations interpreting the ADEA (29 C.F.R. § 810.120). In 1979, responsibility for enforcement of the ADEA was transferred to the E.E.O.C. which adopted 29 C.F.R. § 810.120 and which it later redesignated 29 C.F.R. § 1625.10. The relevant parts of this C.F.R. are reprinted at page A-40 in Appellant's Jurisdictional Statement. Since 1969, these regulations interpreting the ADEA have consistently held that the § 623(f)(2) defense is available only to employee benefit plans in which benefit reductions are justified by significant cost considerations.

While the cost of insurance, retirement and pensions plans are age-related, i.e. costs increase with age, this is not true of the PERS disability plan. To the contrary, the PERS disability plan would seem to cost more for younger employees than for older employees. An employee who becomes disabled at age 23 could receive disability benefits for the remainder of his life (employees who become disabled before age 60 continue to receive disability benefits after age 60). Considering the longer life expectancy of the younger employee, it is likely to cost the employer more for the younger disabled employee because he will draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older.

Long term disability plans were clearly not intended by Congress to be exempted from the ADEA. The Labor Department and E.E.O.C. properly interpreted the legislative intent in 29 C.F.R. § 860.120(f)(1)(iii) [now 29 C.F.R. § 1625.10(f)(1)(iii)] which states:

> where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages.

In this case, one of the reasons the Sixth Circuit rejected PERS' § 623(f)(2) defense was that the cost of a long term disability plan did not increase with the employee's age. Relying upon E.E.O.C. Regulations and the legislative history, the Sixth Circuit stated:

> the district court noted that the "critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors as set forth in the regulatory interpretation of that section" 631 F.Supp. 1198, 1204 (S.D. Ohio 1986). See 29 C.F.R. 860.120(f)(1)(iii). We Agree.

[Appellant's Appendix, page A-4]. The Sixth Circuit's decision is in complete agreement with all circuit court decisions and the E.E.O.C. regulations. See Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 54 (2nd Cir. 1986), E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1489, 1493 (3rd Cir. 1988), Alford v. City of Lubbock, Tex., 664 F.2d 1263, 1272 (5th Cir. 1982), Karleen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir. 1988), E.E.O.C. V. Borden's Inc., 724 F.2d 1390, 1396 (9th Cir. 1988). See also, 29 C.F.R. 860.120(a)(1) and (f)(1)(iii) reprinted at A-40 of Appellant's Jurisdictional Statement.

Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 54 (2nd Cir. 1986), cited by Appellant, held only that "cost considerations" need not be actuarially based. The court recognized that the purpose of the phrase "cost considerations" as used in the interpretation was to rule out the § 623(f)(2) defense where the reduction in benefits for older workers could not be justified by significant cost considerations. 785 F.2d at 54.

Appellant also relied on the concurring opinion in E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1489, 1493 (3rd Cir. 1988). However, the panel held:

> Specifically, we conclude that to disprove subterfuge, Mt. Lebanon must demonstrate why general age-related cost factors required it to reduce benefits for older workers to the extent and in the manner prescribed in the MEIT plan.

842 F.2d at 1090.

Thus, the PERS disability plan is not based on age-related cost factors and is therefore not the type of plan covered under the § 623(f)(2) exemption. The law is unanimous on this point, the decision of the Sixth Circuit should be summarily affirmed on this basis.

E. Even If § The 623(f)(2) Exemption Applies, Post-ADEA Modifications Convert A Pre-existing Plan Into A Subterfuge.

This appeal can be affirmed without reaching the question of whether McMann has been overruled by the 1978 amendment to § 623(f)(2). McMann held that a plan in existence prior to the passage of the ADEA could not be a subterfuge tc evade the purposes of the Act and the employer did not have to demonstrate that a business or economic purpose served as the basis for distinctions in benefits between older and younger workers. McMann, 434 U.S. at 203. The clear implication of McMann was that changes to a plan after passage of the ADEA were not exempted by § 623(f)(2).

There is complete agreement among the circuits that a Pre-ADEA plan that is modified after passage of the ADEA can be a subterfuge if the change is relevant. See, Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 58 (2nd Cir. 1986), Sikora v. American Can Co., 622 F.2d 1116, 1124 (3rd Cir. 1980), E.E.O.C. v. Baltimore and Ohio R. Co., 632 F.2d 1107, 1112 (4th Cir. 1980), Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980), E.E.O.C. v. Cargill, ___ F2d ___, 47 F.E.P. 1122, 1125 n.4 (10th Cir. 1988).

Even E.E.O.C. v. Orange County, 837 F.2d 420, 423 (9th Cir. 1988), relied upon by PERS, recognized that post-ADEA modifications may convert a benefit plan into a subterfuge if the modifications are significant or relevant to the challenged practice.

The ADEA became law in 1967 and was amended in 1974 to include state and local governments. Prior to 1976, the benefits to retirees on the PERS disability plan and retirees on the regular retirement plan were based primarily on years of service and there was no minimum benefit a member could receive. In 1976, O.R.C. § 145.36 [A-1] was amended to provide a minimum payment to disabled members in the amount of 30% of a member's final average salary (FAS). No such minimum was provided for members on regular retirement. The result of this 1976 amendment was to make the disability retirement plan, which had been discriminatory on its face but not in effect, discriminatory in effect as well. Instead of receiving $355.02 (30% FAS) on disability, Betts received only $158.50 per month on regular retirement.

SUMMARY

This Court should affirm the decision of the Sixth Circuit because:

1. The PERS plan violated the 1978 amendment to the ADEA.
2. The PERS plan forced June Betts into an involuntary regular retirement.
3. The PERS disability plan is not the type of plan exempt under § 623(f)(2) of the ADEA.
4. The post-ADEA modifications to the PERS disability plan convert it into a subterfuge.

The record in this case supports these independent reasons to affirm. Therefore, consideration by this court of the narrow question presented by appellant is inappropriate at this time.

Since this case can be decided without reaching the issues raised by appellant, this appeal is too insubstantial to set it for briefing and oral argument.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT F. LAUFMAN
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